

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Year 2000 Biennial Regulatory Review --)	
Amendment of Part 22 of the Commission's Rules)	WT Docket No. 01-108
to Modify or Eliminate Outdated Rules Affecting)	
the Cellular Radiotelephone Service and other)	
Commercial Mobile Radio Services)	
)	

REPLY OF

**AMERICAN HONDA MOTOR CO., INC.,
ATX TECHNOLOGIES, INC.,
DEERE & COMPANY,
GENERAL MOTORS CORPORATION,
MERCEDES-BENZ USA, LLC,
ONSTAR CORPORATION,
TOYOTA MOTOR NORTH AMERICA, INC.,
AND VOLKSWAGEN OF AMERICA, INC.**

**TO COMMENTS FILED IN RESPONSE TO THE
PETITION FOR RECONSIDERATION OF
AT&T WIRELESS SERVICES, INC.**

April 11, 2003

INTRODUCTION

American Honda Motor Co., Inc., ATX Technologies, Inc., Deere & Company, Mercedes-Benz USA, LLC, OnStar Corporation, Toyota Motor North America, Inc., and Volkswagen of America, Inc. (collectively, “Joint Commenters”), hereby submit this Reply to the comment filed by Western Wireless (“Western”) in response to the Petition for Reconsideration (“Petition”) filed January 16, 2003 by AT&T Wireless Services, Inc. (“AWS”) in WT Docket No. 01-108. The Joint Commenters, along with four other parties that filed oppositions to the Petition, 1/ oppose the request by AWS, supported by Western, that the Commission reduce from five years to thirty months the transition period established for the elimination of the analog cellular rule. 2/

In its Opposition to the Petition, incorporated by reference herein, 3/ the Joint Commenters demonstrated the validity of the Commission’s decision based on the needs of 911-only users and the deaf and hard of hearing. The Joint Commenters also demonstrated that the impact of the digital transition on telematics services provides an alternative and independent basis for a five-year transition period, given the current lack of digital telematics devices and the long product, design and life cycles of automobiles. In this Reply, the Joint Commenters explain why Western is incorrect in its assertion that the five-year sunset period was established based on invalid objectives and in an arbitrary and capricious manner.

I. THE COMMISSION BASED THE FIVE-YEAR SUNSET ON VALID PUBLIC INTEREST OBJECTIVES

A. Nationwide Compatibility and Service Quality Are Not New Objectives

Western claims that the Commission determined to retain the analog cellular

1/ See oppositions filed by Sprint Corporation, Self Help for Hard of Hearing People, Telecommunications for the Deaf, Inc. and Rural Cellular Association.

2/ See 47 C.F.R. §§ 22.901(d) and 22.933.

3/ See Opposition of American Honda Corp. *et al.* (Apr. 1, 2003).

requirement for an additional five years in pursuit of “an objective that is completely divorced from the original reason for enacting the rule.” ^{4/} This characterization is inaccurate. In fact, the Commission adopted its various technical standards, including the analog cellular requirement, in order to pursue “a policy of nationwide compatibility and a level of quality comparable to the landline network.” ^{5/}

These objectives are the very same objectives that the Commission now has determined to pursue through the five-year sunset period. Abundant record evidence supports the FCC’s decision to implement a five-year phase-out based on its objective of “nationwide compatibility.” Aside from AMPS, no single technical standard covers more than 53 percent of the United States. ^{6/} Indeed, in the *Part 22 Order* the Commission noted the existence of “geographic areas in which digital coverage is currently insufficient.” ^{7/} It therefore imposed the transition period to “allow for the continued expansion of digital networks and further conversion of analog technologies to digital, thereby providing a more extensive network of digital technologies.” ^{8/}

Likewise, abundant record evidence supports the determination that, in certain important respects, an immediate elimination of the analog cellular rule would be inconsistent with the Commission’s original goal of producing “a level of quality comparable to the landline network.” ^{9/} Most particularly, the Commission determined, based on this evidence, that digital

^{4/} Western Comments at 3.

^{5/} Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, *Notice of Inquiry and Notice of Proposed Rulemaking*, 78 FCC 2d 974 ¶ 54 (1980) (“*Cellular Licensing NPRM*”) (internal quotation marks omitted).

^{6/} *Seventh CMRS Report*, App. C Table 7.

^{7/} Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission’s Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services, *Report and Order*, 17 FCC Rcd 18401, ¶ 24 (2002) (“*Part 22 Order*”).

^{8/} *Id.*

^{9/} *Cellular Licensing NPRM* ¶ 54.

technologies “cause disruptive interference to hearing aids and cochlear implants.” [10/](#) The persistent “clicks, pings or buzzing” [11/](#) caused in hearing aids by digital wireless devices are neither “comparable to the landline network” nor a “level of quality” that is acceptable by any standard.

Western’s objection reduces to a dispute over the weight that these policies should be afforded. Analog cellular service, and the Commission’s analog requirement, are plainly necessary during the five-year transition period to ensure the “nationwide compatibility” of various wireless devices, including 911-only telephones, telematics units, and other devices without digital capabilities. Likewise, it is necessary to produce an acceptable quality of service with respect to hearing aids and cochlear implants. The administrative record is devoid of evidence to the contrary. Although Western takes issue with the emphasis the Commission places on achieving nationwide compatibility and quality of service, it is factually incorrect to claim that these objectives are “new” and therefore impermissible.

B. In Any Event, There is No Legal Prohibition on the Commission’s Consideration of New Objectives

Even if the five-year sunset were based on considerations other than those that led to the initial adoption of the rule, nothing in the text of Section 11 nor any subsequent interpretations of that provision would prohibit such considerations. As previously described in detail by the Joint Commenters, the text of the statute imposes no such restriction on its face, and the Commission itself recognized this fact in its *Part 22 Order*. [12/](#) In a decision construing Section 202(h) of the

[10/](#) *Part 22 Order* at ¶ 26.

[11/](#) *Id.* See also, e.g., Telecommunications for the Deaf Reply Comments at 6-8; National Association for the Deaf Reply Comments at 7-13.

[12/](#) See Opposition of American Honda Corp. *et al.* at 6-7; *Part 22 Order* at n.16.

Telecommunications Act of 1996, [13/](#) which contains language that substantially mirrors that of Section 11, the U.S. Court of Appeals for the D.C. Circuit considered and rejected the argument now being made by Western, stating that “[n]othing in [the statute] suggests the grounds upon which the Commission may conclude that a rule is necessary in the public interest are limited to the grounds upon which it adopted the rule in the first place.” [14/](#) Western’s attempt to artificially constrain the scope of the Commission’s consideration is accordingly “without merit.” [15/](#)

II. THE COMMISSION’S DECISION TO ESTABLISH A FIVE-YEAR SUNSET OF THE ANALOG CELLULAR RULE WAS NOT ARBITRARY AND CAPRICIOUS

A. The Commission Acted Rationally in Setting the Transition Period at Five Years, Based on Two Independent Grounds

Western states that the Commission’s determination that a five-year transition period is needed (to protect the interests of 911-only users) “bears no rational relationship” to the fact that a consumer uses a handset on average for 18 to 30 months before acquiring a new one, observing that “eighteen to thirty months is not five years.” [16/](#) However, by implying that the transition period should be the same as the handset turnover rate, Western incorrectly assumes that after one 30-month handset “cycle,” there would be a sufficient number of digital phones provided to the 20-30 million 911-only analog phone users to ensure their ability to dial 911 in emergencies. [17/](#)

It would, of course, be unreasonable to assume that all used handsets will be donated to 911-only users. Some handsets are lost or stolen. Others are broken or otherwise become non-functional. Still others are retained by the original purchaser as a spare, or are sold in the secondary market (*e.g.*, on eBay). Moreover, although there are a number of different phone

[13/](#) See Pub. L. No. 104-104, § 202, 110 Stat. 56 (1996).

[14/](#) *Fox Television Stations v. FCC*, 280 F.3d 1027, 1050 (D.C. Cir. 2002).

[15/](#) *Id.*

[16/](#) Western Comments at 8; *Part 22 Order* at ¶ 25.

[17/](#) *Part 22 Order* at n.75 (citing record submissions estimating that 20-30 million unsubscribed analog phones are in use).

donation programs, only some provide handsets free of charge for use as 911-only phones. Many programs refurbish and sell donated phones to benefit various charities. ^{18/} Some sell or donate the phones for use in developing countries, effectively ensuring that the handsets will *not* find their way to 911-only users in the United States. ^{19/} Finally, as the Commission noted in the *Part 22 Order*, not all donated handsets are digital. ^{20/}

The record in the Part 22 proceeding contained no data regarding the percentage of used digital handsets that are donated to 911-only users. Thus, given the wide range of possible “fates” for used digital handsets, the Commission acted well within reason in setting a transition period that encompasses two handset replacement cycles. ^{21/}

^{18/} See <http://www.wirelessfoundation.org/DonateaPone/index.cfm> (describing the Sprint PCS collection program that benefits Easter Seals and the National Organization on Disabilities); <http://www.ahanm.org/Programs/DonateAPhone/donateaphone.htm> (describing the Animal Humane Association program) (visited Apr. 8, 2003). In fact, phone recycling programs are marketed to charities as a means of fundraising. See <http://www.charitablerecycling.com/CR/home.asp> (visited Apr. 8, 2003).

^{19/} See <http://www.collectivegood.com> (visited Apr. 8, 2003).

^{20/} See *Part 22 Order* at ¶ 25, n.80. Although acknowledging that the number of donated digital handsets will likely rise, the Commission noted that that Verizon indicated that only 30 percent of handsets donated through its program since 1995 have been digital.

^{21/} Well over one-fourth of the more than 100 million digital handsets currently in use would be needed to replace the analog handsets currently employed by 30 million 911-only users. See *Part 22 Order* at ¶¶ 23-25. As stated above, the Joint Commenters believe the Commission made a rational decision on this issue based on the data then available. However, handset turnover has slowed considerably since the record was compiled. See, e.g., Paul Kirby, “Nextel Urges FCC to Remove 2005 Deadline for Deployment of Phase II E911 Technology,” *TR Daily*, Mar. 17, 2003 (citing statements by Nextel Senior Vice President Robert Foosaner regarding the substantial fall in customer growth rates and churn, resulting in a handset replacement rate much slower than previously anticipated by the FCC). This slow-down suggests that, when today’s turnover rates are taken into account, the five-year transition period established by the Commission may be far shorter than what is actually needed to replace the 911-only handsets currently in circulation.

Western also asserts that “[t]he only explanation the Commission offers” to support the five-year transition period is based on the handset turnover rate. [22/](#) Western apparently skipped paragraph 29 of the *Part 22 Order*, in which the Commission clearly stated that:

We conclude that a five-year period provides a reasonable time frame for the development of solutions to hearing aid-compatibility issues. The progress made in developing digital TTY solutions leads us to determine that the industry will also likely be able to develop digital solutions for telephones within a five-year period. [23/](#)

Thus, the Commission established a second, independent basis for its five-year transition period. In doing so, the Commission relied on its experience in an analogous context – overseeing the development and deployment of digital solutions for TTY devices. In the TTY proceeding, the majority of wireless providers deployed digital TTY capability by June 2002, approximately five years after the Wireless TTY Forum first met in September 1997 to begin working on a solution. [24/](#)

Nothing in the record provides convincing evidence that the development of a fully-satisfactory digital hearing aid-compatibility solution will be in place and available to a majority of hearing aid users in less than the five years required in the TTY context. Indeed, based on comments filed last year from handset manufacturers in the Hearing Aid Compatibility (“HAC”) proceeding, the outlook for a swift solution is bleak. Panasonic stated, for example, that “[i]t simply is not technically feasible to produce a digital wireless phone that will not interfere with all hearing aids; the interference arises from inherent aspects of digital transmission technology.” [25/](#)

[22/](#) Western Comments at 8.

[23/](#) *Part 22 Order* at ¶ 29.

[24/](#) See *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Order, 17 FCC Rcd 12,084 (WTB 2002). If anything, the Commission’s five-year expectation is overly optimistic based on the TTY experience, which, if measured from the date of the 1996 order imposing the requirement, took over six years.

[25/](#) Matsushita Electric Corporation of America (“Panasonic”) Comments, WT Dkt. 01-309 (Jan. 11, 2002) at 10.

Motorola asserted that “simply ordering phones to become usable with all hearing aids would be to ask the impossible The only way to ensure that interference with an unimproved hearing aid doesn’t occur is to turn the phone off.” [26/](#)

There is a consensus among many commenters that hearing aid manufacturers – which are under the jurisdiction of the Food and Drug Administration, not the FCC – must be an integral component to any solution to the interference problem. [27/](#) The hearing aid industry has responded, however, that although it “is doing its part . . . the telephone handset industry has not used all of the tools at its disposal.” [28/](#) Although all sides claim to be cooperating to reach a solution, and an ANSI-based standard for hearing aid compatibility has been developed, the strong differences of opinion expressed in the HAC proceeding comments suggest that an acceptable solution is far from imminent. [29/](#)

Additionally, as the Commission and others have noted, only a portion (as few as 20%) of all hearing aids in use are t-coil equipped, meaning that users of these devices may not benefit from any hearing aid compatibility standard that is based on t-coil use. [30/](#) Moreover, even if an

[26/](#) Motorola Reply Comments, WT Dkt. 01-309 (Feb. 11, 2002) at 3.

[27/](#) See, e.g., Self Help for Hard of Hearing People (“SHHH”) Reply Comments, WT Dkt. 01-309 at 2-3; Panasonic Comments, WT Dkt. 01-309 (Jan. 11, 2002) at 5; American National Standards Institute Accredited Standards Committee 63 (“ANSI”) Comments, WT Dkt. 01-309 (Jan. 11, 2002) at 16. The need for broad involvement by all interested parties – not just carriers and handset manufacturers – in order to develop a solution is, in fact, similar to the situation in the TTY context, upon which the Commission relied in determining the length of the transition period.

[28/](#) Reply Comments of the Hearing Industries Association, WT Dkt. 01-309 (Feb. 11, 2002) at 6.

[29/](#) See Jeffrey Silva, “Wireless Distances Itself from Hearing-Aid Compatibility Standard,” *RCR Wireless News*, Apr. 7, 2003 at 12 (reporting that mobile phone carriers believe the current ANSI standard “needs more work,” and that the hearing aid industry voted against the standard).

[30/](#) See Reply Comments of Motorola, WT Dkt. 01-309 (Feb. 11, 2002) at 2-3 (explaining that the FCC’s current implementation of the HAC Act in the wireline context relies on a phone standard “directed solely at use with hearing aids that have t-coils with certain standard characteristics,” and that 80% of hearing aid users do not have t-coils); see also *Part 22 Order* at n.85 and ¶ 27.

acceptable digital solution is developed in less than the five-year period, additional time will be needed to replace the existing embedded base of non-compatible devices. ^{31/} Thus, given the number of parties and the complex technical issues involved in resolving digital compatibility and interference issues, the Commission acted rationally in determining that ensuring access by the nation's 8 million hearing aid users to digital wireless services would take at least as long as the TTY compatibility process took, if not longer. ^{32/}

B. The Solutions Advanced by Western Are Insufficient to Ensure that the Hard of Hearing Will Have Adequate Access to Digital Wireless Service

Western also claims that the Commission did not meet its burden of showing that the temporary retention of the analog cellular rule was “necessary in the public interest.” ^{33/} Specifically, Western argues that the Commission must fully consider the existing technologies available to assist persons with hearing disabilities secure access to digital wireless services. ^{34/} Western refers to “loop accessories that can be plugged in to several [handset] models,” ^{35/} and to the CHAAMP technology from Audex, an external, \$130 device that attaches only to Nokia handsets. ^{36/}

As the Commission has recognized, both Congress and hearing aid users have rejected the use of external, add-on devices as a solution to ensure wireless accessibility. External devices are

^{31/} See National Association of the Deaf Comments, WT Dkt. 01-108 at 2 (noting that, after handsets become hearing aid-compatible, “a substantial transition period is necessary to protect those who rely on the embedded base of analog TTY and hearing technologies”).

^{32/} The Commission addressed the “if not longer” possibility by reserving its authority to extend the transition period if required carrier reports indicate that digital solutions will not be available by the end of the five years. See *Part 22 Order* at ¶¶ 29, 31.

^{33/} See Western Comments at 5-7.

^{34/} Despite the implication, the Commission did not fail to consider the availability of attachments. See *Part 22 Order* at n.85.

^{35/} Western Comments at 6.

^{36/} Audex, Inc. Ex Parte Letter, WT Dkt. 01-309 (July 25, 2002) at 2.

typically expensive, cumbersome and inconvenient. ^{37/} As one consumer group has noted, even if attachments are reasonably feasible for placing outgoing calls, “it becomes difficult to assemble the attachments and configure the various components, including a hearing aid, in time to receive an incoming call.” ^{38/} Congress recognized these difficulties in crafting the HAC Act, and required telephones to “provide *internal means* for effective use with hearing aids” ^{39/} Thus, Western’s suggested use of attachments does not appear to be an acceptable means of achieving digital wireless accessibility. ^{40/}

C. Section 255 Provides Insufficient Assurance that the Deaf and Hard of Hearing Would Have Adequate Access to Mobile Services if the Analog Cellular Rule Were Eliminated More Quickly

In its comments, Western repeats AWS’ argument, rejected by the Commission, that Section 255 is sufficient to ensure that persons with hearing disabilities will have adequate access to mobile services. ^{41/} In the *Part 22 Order*, the Commission agreed that Section 255 creates an

^{37/} See Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket 01-309, Notice of Proposed Rulemaking, FCC 01-320 (rel. Nov. 14, 2001) at ¶ 20 (citing multiple comments) (“HAC NPRM”). The expense of the attachments may be especially burdensome on persons with severe hearing loss who are more likely to be unemployed and have limited budgets. See *id.* at n.58.

^{38/} SHHH Comments, WT Dkt. 01-108 at 6. See also SHHH Reply Comments, WT Dkt. 01-309 at 3 (noting that “a hearing person who uses a cell phone can choose to use [hands free] accessories for a planned outgoing call, but does not need to wear these accessories in anticipation of a potential incoming call”).

^{39/} 47 U.S.C. § 610(b)(1) (emphasis added).

^{40/} Even worse than relying on mobile handset attachments, Western suggests that alternative technologies could be used for digital wireless access, such as PDAs with e-mail capabilities, TTYs, pagers and text messaging products. See Western Comments at 6. While these devices may be acceptable solutions for persons with total hearing loss, they are clearly unacceptable substitutes for hearing aid users who currently communicate by means of voice-capable analog handsets.

On another front, Western attempts an argument against the *Part 22 Order* based on the fact that the analog cellular rule does not require carriers to continue marketing analog service. See Western Comments at 5. However, as long as analog service is *available* as required by the rule, a handset with analog capability would be able to access the carrier’s analog service.

^{41/} Western Comments at 7.

independent requirement for providers to make their services available to persons with hearing disabilities, but concluded that Section 255 alone was inadequate “to address the *particular* current problem of hearing aid-compatibility with digital handsets.” [42/](#)

In its decision, the Commission distinguished between the *general* obligation imposed by Section 255 to make services accessible to persons with hearing disabilities, and one *specific* means of achieving that accessibility – *i.e.*, the use of handsets by hearing aid users. By making this distinction, the Commission implicitly recognized the possibility that a carrier might discontinue its analog network, yet assert compliance with Section 255 based, for example, on the existence of some of the very unacceptable alternatives suggested by Western – including expensive, cumbersome attachments or non-voice-capable products. [43/](#) Moreover, any complaints of Section 255 non-compliance could require lengthy investigations by the Commission, during which time hearing aid users could be left without reasonable access to mobile services, with potentially serious safety and economic consequences.

CONCLUSION

For the reasons described above, the Commission should reject the arguments made by Western and deny AWS’ Petition for Reconsideration. The Commission’s decision was neither based on impermissible objectives, nor arbitrary and capricious.

[42/](#) See *Part 22 Order* at ¶ 30 (emphasis added).

[43/](#) See *supra* Section B. It is conceivable that, under Section 255’s “readily achievable” standard, the provider could assert a defense to providing anything other than these unacceptable alternatives.

Respectfully Submitted,

/s/ Edward B. Cohen

**AMERICAN HONDA MOTOR CO.,
INC.**

Edward B. Cohen
Vice President,
Government & Industry Relations
955 L'Enfant Plaza, SW Suite 5300
Washington, DC 20024

/s/ Gary Wallace

ATX TECHNOLOGIES, INC.

Gary Wallace
Vice President, External Affairs
8550 Freeport Parkway
Irving, TX 75063

/s/ Cloyce Newton

DEERE & COMPANY

Cloyce Newton
John Deere Global Vehicle
Communications
4080 McGinnis Ferry Road, Suite 502
Alpharetta, GA 30005

/s/ Kenneth D. Enborg

GENERAL MOTORS CORPORATION

Kenneth D. Enborg
Assistant Secretary
300 Renaissance Center
MC 482-C23-B21
Detroit, MI 48265-3000

/s/ Klaus Ulkann

MERCEDES-BENZ USA, LLC

Klaus Ulkann
Vice President, Customer Services
One Mercedes Drive
Montvale, NJ 07645

/s/ William L. Ball

ONSTAR CORPORATION

William L. Ball
Vice President, Public Policy
MC 480-914-300
1400 Stephenson Highway
Troy, MI 48083

/s/ Douglas M. West

**TOYOTA MOTOR NORTH
AMERICA, INC.**

Douglas M. West
Senior Vice President
Government & Industry Affairs
1800 M Street, NW Suite 600
Washington, DC 20036

/s/ Joe Kennebeck

VOLKSWAGEN OF AMERICA, INC.

Joe Kennebeck
Director, Government Affairs
1300 Pennsylvania Avenue, NW
Suite 860
Washington, DC 20004

April 11, 2003

CERTIFICATE OF SERVICE

I, Jean Claire Meikle, do hereby certify that the foregoing Reply of the Joint Commenters was served this 11th day of April, 2003, by first-class U.S. mail on:

Douglas I. Brandon
David C. Jatlow
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
Fourth Floor
Washington, DC 20036

Howard J. Symons
Counsel to AT&T Wireless Services, Inc.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

Gene A. DeJordy
Vice President of Regulatory Affairs
Western Wireless Corporation
3650 131st Avenue, SE
Suite 400
Bellevue, WA 98006

/s/ Jean Claire Meikle

Jean Claire Meikle